No. 44259-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JARED PINSON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 12-1-00304-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. During closing argument the prosecutor briefly referred to signs or symptoms associated with domestic violence, but there was no testimony or other evidence in the record in regard to those signs or symptoms. Because the prosecutor's remarks were not flagrant or ill-intentioned, and because Pinson has not shown prejudice from the prosecutor's remarks, no prosecutorial misconduct occurred.

2. During closing arguments, the prosecutor argued to the jury that, because Pinson remained silent when officers asked him if his fight with the victim was "physical," his silence was evidence of his guilt. Pinson contends that the prosecutor's comment on his silence violated his pre-*Miranda* 5th Amendment and Wash. Const. art. I, § 9 right to remain silent. The State contends that pursuant to the recent case of *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), the prosecutor's comment did not constitute error and that, even if it had been error, the error would be harmless beyond a reasonable doubt on the facts of the instant case.

3. Police who investigated this case completed a DV investigation form and included it in the case file. Among other information, the form included a checked box and notation that indicated that Pinson and the victim had been involved in a prior report of domestic violence. During the trial, Pinson's attorney had this form admitted into evidence. Based upon this fact, Pinson alleges ineffective assistance of counsel. The State contends that counsel was not ineffective because there was a strategic or tactical reason to admit the form, it was not substantially prejudicial, and Pinson has failed

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to show that the result of the trial would have been different had the form not been admitted into evidence.

4. Prior to trial, the court ruled in limine that the parties should not elicit testimony regarding Pinson's silence that occurred when an officer asked him whether a fight between him and the victim had become "physical." Despite this ruling, Pinson's trial attorney pursued a line of questioning that "opened the door" to the allow the prosecutor to elicit this testimony on redirect. Pinson contends that his trial counsel was ineffective by causing this testimony to be allowed into the record. The State contends that Pinson has failed to show that his attorney lacked a tactical reason for allowing the testimony and has failed to show that the verdict would have been different if not for this testimony.

5. The trial court, apparently inadvertently, provided a "reasonable doubt" jury instruction that differed from WPIC 4.01 because it erroneously omitted the sentence that "[t]he defendant has no burden of proving that a reasonable doubt exists." The State contends that this error was harmless beyond a reasonable doubt.

6. Pinson contends that the trial court infringed upon his constitutional right to counsel when at sentencing following his conviction it ordered him to pay the costs of his public defender. Because Pinson failed to preserve this issue with an objection in the trial court, he should not be permitted to raise the issue for the first time on appeal. Finally, because Pinson has the ability to work as a fast-food restaurant manager, the court did not err when it ordered Pinson to pay costs at the rate of $25.00 per month.

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B. FACTS AND STATEMENT OF THE CASE

On July 29, 2012, Deputy Nault of the Mason County Sheriff's Office responded to a home in Mason County in response to a 911 call of domestic violence. RP 13-14. When he arrived, he found the victim outside of the home sobbing, crying and holding her neck. RP 15. She told the deputies that Pinson had grabbed her by the neck, choked her until she could not breath, and then threw her to the ground. RP 15, 44, 48. She had corroborating red marks around her neck. RP 44. Pinson and the victim were in a dating relationship and had lived together for several years. RP 50-51, 64.

The State charged Pinson with assault in the second degree by strangulation and alleged the special allegation of domestic violence. CP 23-24. The jury returned a guilty verdict and answered yes to the special allegation. RP 117.

C. ARGUMENT

1. During closing argument the prosecutor briefly referred to signs or symptoms associated with domestic violence, but

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there was no testimony or other evidence in the record in regard to those signs or symptoms. Because the prosecutor's remarks were not flagrant or ill-intentioned, and because Pinson has not shown prejudice from the prosecutor's remarks, no prosecutorial misconduct occurred.

During closing arguments, mixed within the arguments as a whole, the prosecutor argued, in part, to the jury as follows:

> In regards to Stacey Campell, she didn't tell you something that was inconsistent with what she told the police. All she told you was that she doesn't remember it. *Now, when it comes to domestic violence, a symptom of domestic violence is minimization, sometimes recantation, oftentimes selective memory.* [Emphasis added]. And I would submit, what you heard from Stacey Campbell on the stand was selective memory. Months later, she's had time to reflect on the fact that her boyfriend, someone who she testified she cares about, she is still in a relationship with and whom she loves - she has time to think about it and she doesn't want to see him get into trouble, and therefore she has selective memory.
>
> She might also have selective memory because she lived through a traumatic event. And you all know, through personal experience, common experience, that when you live through a traumatic event, you tend to want to forget, you tend to want to forgive and you tend to want to put it on a shelf, set it aside and let it go. That's obviously what she's attempting to do. But that doesn't excuse the defendant's conduct on July 29. We treat domestic violence very seriously because if we don't, things spiral out of control. And we treat strangulation very seriously because the consequences are potentially dire. And they were in this case. After all, she did tell the police that he held her down, she couldn't breathe and she was afraid for her life.

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RP 95-96. During rebuttal closing argument, the prosecutor then argued, in part, as follows:

> Regarding a follow up investigation, counsel hit on that. That was one of his key arguments. The best evidence is taken on the night of the incident. I mean, you have a 911 tape that's freeze frame real time, what's going on once it's happening and real expressions of distress. *Especially when you're talking about an incident of domestic violence as you go further in time, there tends to be minimization and recantation.* [Emphasis added]. And so, the suggestion that a follow up investigation would have helped one way or the other is not accurate.

RP 108.

On appeal, Pinson contends that the prosecutor's comments (italicized above) constitute prosecutorial misconduct because the statements were unsupported by evidence. Appellant's Opening Brief at 8-10. Pinson did not object to statements at trial. There was no testimony or other evidence offered in regard to the symptoms or effects of domestic violence. RP 12-81.

Prosecutorial misconduct is grounds for reversal only if the prosecutor's conduct was both improper and prejudicial. *State v. Monday,* 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The prosecutor's conduct in closing argument is reviewed in the context of the full trial, including the

evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions. *Id.*

It is generally improper for a prosecutor to refer to evidence that was not presented at trial. *State v. Russell,* 125 Wn.2d 24, 87, 882 P.2d 747 (1994). "But, in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Magers*, 164 Wn.2d 174, 192, 189 P.3d 126 (2008); *see also, State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

When there is no trial court objection to alleged prosecutorial misconduct, reversal is required only if the conduct is so flagrant and ill-intentioned that it causes an enduring prejudice that could not have been cured by a curative instruction. *State v. Warren,* 165 Wn.2d 17, 43, 195 P.3d 940 (2008). "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008), quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of proving both prongs of the claim of prosecutorial misconduct. *Magers* at 191.

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In the instant case, the prosecutor's comments were brief and unsubstantial in the greater context of the prosecutor's entire argument. The jury was instructed as follows:

> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and exhibits admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

RP 82. Additionally, the jury was instructed that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyer's statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

RP 83.

On the facts of the instant case, Pinson cannot meet his burden of showing that the prosecutor's comments were flagrant or ill-intentioned. *Magers* at 191. Neither can Pinson show that the alleged error could not have been cured by a curative instruction. *Id.* Finally, Pinson has not shown, and cannot show, that there is a substantial likelihood that the prosecutor's brief comments affected the jury's verdict. *Id.* Because it is Pinson's burden to show both prongs of prosecutorial misconduct, and he

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has failed to show either prong, his claim of prosecutorial misconduct is not grounds for a new trial. *Id.*

> 2. During closing arguments, the prosecutor argued to the jury that, because Pinson remained silent when officers asked him if his fight with the victim was "physical," his silence was evidence of his guilt. Pinson contends that the prosecutor's comment on his silence violated his pre-*Miranda* 5th Amendment and Wash. Const. art. I, § 9 right to remain silent. The State contends that pursuant to the recent case of *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), the prosecutor's comment did not constitute error and that, even if it had been error, the error would be harmless beyond a reasonable doubt on the facts of the instant case.

When Deputy Nault initially arrived at Pinson's house in response to a report of domestic violence, he first contacted the alleged victim, and he then immediately contacted Pinson. RP 18. Deputy Nault provided the following testimony about his contact with Pinson:

> A. I took Jared outside. I asked him, you know, what happened tonight between you and Stacey, and he said they had been drinking. Before they went – he went to bed, they got into a fight. And he didn't – that's the statement I was provided, nothing further.

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Q. Describe the defendant's demeanor on that night.
A. He appeared to be hesitant and somewhat nervous and kind of distant from me and my partners.
Q. Were you able to determine the defendant's relationship to Stacey Campbell?
A. Yes.
Q. And what was it?
A. Stacey and Jared both advised they had been living together. Stacey told me they had been dating for approximately a year and living together for six months.

RP 18-19. On cross examination, Deputy Nault then provided the following testimony:

Q. Now, when you – you testified that you asked Mr. Pinson what had happened and he said something that they had gotten into a fight or you had asked him if they had gotten into a fight.
A. Uh-hum.
Q. Did you couch that term fight in – did you ask him if it was a physical fight or if it was an argument?
A. I initially asked, you know, what's going on tonight with – between you and Stacey. He said – he stated, we had been drinking tonight, before we went to bed we got into a fight. I believe that was the exact statement.
Q. Okay. Okay. But you didn't take it a step further and ask him it if it was physical or --
A. After he said it was – they got into a fight, I asked if it was physical, and he stuck with that original statement.

RP 22-23. After this testimony was provided on cross examination by Pinson's attorney, the prosecutor then argued to the court that the defense

cross examination had opened the door to further testimony about Pinson's silence when Deputy Nault asked him whether the fight had been physical. RP 27-28.

In response to the prosecutor's argument, Pinson's trial attorney said:

> Your Honor, the deputy did respond that he responded that, yes, we had been fighting and that that was it. Mr. Pinson's response to the deputy was to not say anything. And that's fine. I – if the State wants to ask him about that, I think it's only one question; did he respond to your question as to whether or not it got physical. And the answer would be no. So, I guess I don't have a basis for objection if the Court finds that I opened the door.

RP 28.

The court then agreed that the cross examination had opened the door to the additional question, and the court then allowed further questioning. RP 28-30.

On redirect, the prosecutor then elicited the following testimony from Deputy Nault:

Q. Counsel also asked you a question about - I believe you testified that you asked the defendant whether the fight that he indicated they had had that night, whether that fight got physical.
A. Correct.
Q. How did he respond to that question?

A. He said – again, he stated they had been drinking tonight and before they went to bed they got into a fight. That was what he told me. Then when I asked him if it got physical, then he again – he stuck with his first statement and then became quiet. He never indicated if it had gotten physical. He never specifically said yes, it got physical.

MR. SIGMAR: No further questions, Your Honor.

RP 32-33. Although this fact is not specifically stated in the record, it is presumed from the context of the facts that Pinson was not under arrest and had not been provided *Miranda* warnings when this exchange with Deputy Nault took place.

In closing argument, the prosecutor then referred to the exchange as follows:

> We also have the defendant's actions and his mannerisms and his statements on the night in question, which corroborate that in fact when the assault occurred on the night in question. He is asked about what happened, and he says, yes, we were in a fight. That corroborates what happened, that they were involved in a fight.
>
> The next question Deputy Nault asked him is did the fight get physical. And his answer to that is not to respond to it, which is evidence of his guilt, that he has something to hide, because as I think you all know from your common experience, if you were confronted late at night, woken up by two police officers who want to take you to jail and they confront you with that type of question, if you're innocent, you're going to have a wholly different response.

RP 94.

Although he did not object in the trial court, on appeal Pinson now contends that the prosecutor's argument was an improper comment on his right to remain silent. Appellant's Opening Brief at 11-13. Because he did not object, Pinson bears the burden on appeal of showing that the prosecutor's comment was flagrant and ill-intentioned and that a curative instruction would not have remedied the error. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012); RAP 2.5(a)(3).

A defendant has both a pre-arrest, pre-*Miranda* right to remain silent under the 5th Amendment and a post-arrest, post-*Miranda* right to remain silent under the 14th Amendment. *See, e.g., State v. Carnahan*, 130 Wn. App. 159, 167-68, 122 P.3d 187 (2005). Because the issue in the instant case is limited to Pinson's pre-*Miranda* silence, the State's brief is limited to this issue.

Both our state and federal constitutions protect an individual's pre-arrest right to remain silent. *State v. Burke*, 163 Wn.2d 204, 206, 217, 181 P.3d 1 (2008)(defendant has pre-arrest right to remain silent under Wash. Const. art. I, § 9 and under 5th Amend. of US Constitution), citing *Griffin v. California,* 380 U.S. 609, 614–15, 85 S.Ct. 1229, 14 L.Ed.2d 106

(1965); *State v. Easter,* 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). Under this line of cases a defendant's pre-arrest silence may be used to impeach his or her trial testimony, but pre-arrest silence may not be used as substantive evidence of guilt. *Burke* at 206, citing *State v. Clark,* 143 Wn.2d 731, 765, 24 P.3d 1006, *cert. denied,* 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001). The prosecutor in the instant case argued in closing that Pinson's pre-arrest silence was evidence of his guilt. RP 94. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis,* 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

However, an exception occurs when a defendant does not exercise his right to remain silent. *State v. Hager*, 171 Wn. 2d 151, 157, 248 P.3d 512 (2011); *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001). "When a defendant does not remain silent and instead talks to police, the state may comment on what he does *not* say." *Clark* at 765, citing *State v. Young,* 89 Wn.2d 613, 621, 574 P.2d 1171 (1978) (further citations omitted).

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In the instant case, Pinson first spoke voluntarily to Deputy Nault. RP 18-19. After having spoken voluntarily, he then avoided answering a clarifying question about whether the "fight" was "physical." RP 22-23. Thus, on the facts of the instant case, if relevant to impeachment it would not be error to allow evidence of Pinson's pre-arrest silence on the subject of impeachment of his trial testimony. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). Nevertheless, under *Burke* the use of such testimony is limited to impeachment, and the defendant's pre-arrest silence may not be used as substantive evidence of guilt. *Id.* at 206, 217-23.

The United States Supreme Court has recently ruled, however, that unless the defendant expressly invokes his or her 5th Amendment right to remain silent, the 5th Amendment does not bar use of the defendant's pre-*Miranda* silence as substantive evidence of guilt. *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013). Faced with circumstances similar to those of the instant case, the Court reasoned that "[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." *Id.* at 2182.

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The United States Supreme Court is the last word on federal constitutional rights; so, *Salinas* supercedes any contrary decisions of Washington appellate courts in regard to interpretation or application of the 5th Amendment. *See, e.g., State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008) (repudiating the rule adopted in *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982)).

But Pinson also contends that use of his pre-*Miranda* silence as substantive evidence of guilt violated Washington Constitution art. I, § 9. However, Pinson has not briefed the factors required by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Generally, reviewing courts will not consider whether the state constitution provides more protection than it's federal counterpart unless the appellant briefs the *Gunwall* factors. *State v. Bustamante-Davila*, 138 Wn.2d 964, 978-79, 983 P.2d 590 (1999).

Even if Pinson had provided the *Gunwall* analysis, his claim should fail. Our Washington Supreme Court has consistently held that our state constitution is co-extensive with the federal constitution. *See State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994) (refusing to extend greater protection through Const. Art. 1, § 9 than that provided by the federal constitution to the use of un-Mirandized statements); *State v.*

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Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). ("[R]esort to the *Gunwall* analysis is unnecessary because this court has already held that the protection of Article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment."); *Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980) (state constitution provides no greater protection for minors waiving their right to remain silent than is provided by the Fifth Amendment); *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) ("The Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion."). However, the Washington Supreme Court recently heard oral argument in the case of *State v. Piatnitsky*, COA No. 87904-4, and the ruling in this case may potentially affirm, reverse, expand or modify existing precedent on this issue.

Even where a defendant's pre-arrest silence is erroneously presented as substantive evidence of guilt, however, the error may be harmless. *Burke* at 222-23. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where

the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Id.* at 222.

The challenged comment at issue in the instant case was brief and unsubstantial and could have been cured by an objection and a curative instruction from the court.[1] Thus, Pinson has not met his burden of showing that the comment was flagrant and ill-intentioned and that a curative instruction would not have remedied the error. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012); RAP 2.5(a)(3).

Still more, the error was harmless because the substantive weight of the comment was very slight. The Court in *Burke* offered the following explanation for its reasoning that such evidence should not be admissible substantively:

> "Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's 'awareness that he is under no obligation to speak or the natural caution that arises from his knowledge that anything he says might be later used against him at trial,' a belief that efforts at exoneration would be futile under the circumstances or because of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because 'they are simply fearful of coming

[1] In both *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008), and *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), the issue was preserved because it was raised first in the trial court; here, there was no objection.

> into contact with those whom they regard as antagonists.' In most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence."

State v. Burke, 163 Wn.2d 204, 218-19, 181 P.3d 1 (2008), quoting *People v. De George*, 73 N.Y.2d 614, 618–19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989) (citations omitted). The comment at issue in the instant case had little substantive value;[2] therefore, despite the prosecutor's argument that Pinson's silence was evidence of his guilt, a reasonable jury would not have given weight to Pinson's silence in the circumstances of the instant case. Where it is clear beyond a reasonable doubt that the jury would have returned the same verdict in the absence of the erroneous comment, the error is harmless. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

3. Police who investigated this case completed a DV investigation form and included it in the case file. Among other information, the form included a checked box and notation that indicated that Pinson and the

[2] In the context of the instant case, Pinson's non-answer when asked whether "it got physical" is not strongly suggestive of guilt where the accusation was that he had grabbed his girlfriend by the throat, cut off her breathing, and then threw her to the ground. RP 14-17, 32-33, 48, 93. While to "get physical" might suggest an assault of some kind, such as a push or a shove, it does not necessarily amount to strangulation, and it could mean that Pinson was the recipient of some kind of physical aggression. If Pinson were asked, "did you grab her by the throat, cut off her breathing, and throw her to the ground?", then his silence would have been much more obviously incriminating.

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> victim had been involved in a prior report of domestic violence. During the trial, Pinson's attorney had this form admitted into evidence. Based upon this fact, Pinson alleges ineffective assistance of counsel. The State contends that counsel was not ineffective because there was a strategic or tactical reason to admit the form, it was not substantially prejudicial, and Pinson has failed to show that the result of the trial would have been different had the form not been admitted into evidence.

To show on appeal that his trial attorney was ineffective because he did not object to the admission of evidence, Pinson must show that there was no strategic or tactical reason for the trial attorney's failure to object to admission of the evidence and that if there would have been an objection it would have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996). If these two factors are shown, Pinson must also show that the result of the trial would have been different had the error not occurred. *Id.*

During cross examination of Deputy Nault, Pinson's trial attorney referenced Exhibit 4 to make the point that several of the factors normally associated with strangulation were missing from the from. RP 23-27.

Later, defense counsel moved for admission Exhibit 4, and the court admitted the exhibit into evidence. RP 34.

The record is unclear as to why it was necessary or important to the defense to have the exhibit admitted into evidence, rather than to merely elicit the relevant testimony from the testifying officer (or to submit a redacted copy of the exhibit). In addition to undermining the State's allegation of strangulation (a fact which favored the defense), the form also described the victim as being under the influence of alcohol and reported that there had been a prior incident of domestic violence involving Pinson and the victim. Ex. 4.

A mere report that there had been a prior report of domestic violence involving the same parties is not particularly probative of whether Pinson strangled the victim as alleged in the instant case. Assuming that such evidence had the potential of prejudice to him, it follows that the probative value of such evidence, if any, would be substantially outweighed by the danger of unfair prejudice. Thus, it is likely that had he moved to exclude evidence the evidence his motion would have been granted. ER 403.

But it is not clear that the result of the trial would have been different had the exhibit not been provided to the jury. There was no argument made to the jury in regard to the extraneous information contained on the form. RP 93-111. The extraneous information was not probative any fact at issue in the case, and there is no reason that the jury would have been influenced by it. The substantive evidence in the case, to include the officers' observations and the victim's excited utterances at the time of the assault (RP 14-15, 17, 44), are sufficient to show that the jury's verdict would have been the same even if the extraneous information on Exhibit 4 would have been redacted or otherwise excluded from evidence. Because Pinson has not shown that the result of the trial would have been different had the error not occurred, he has not shown ineffective assistance of counsel. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *State v. Hendrickson,* 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

4. Prior to trial, the court ruled in limine that the parties should not elicit testimony regarding Pinson's silence that occurred when an officer asked him whether a fight between him and the victim had become "physical." Despite this ruling, Pinson's

> trial attorney pursued a line of questioning that "opened the door" to the allow the prosecutor to elicit this testimony on redirect. Pinson contends that his trial counsel was ineffective by causing this testimony to be allowed into the record. The State contends that Pinson has failed to show that his attorney lacked a tactical reason for allowing the testimony and has failed to show that the verdict would have been different if not for this testimony.

To prevail on his claim of ineffective assistance of counsel, Pinson must show both that his counsel's performance fell below an objective standard of reasonableness in consideration of all the circumstances and that but for counsel's deficient representation the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Trial counsel's performance is presumed to be effective, and on appeal the defendant bears the burden of showing from the record that there was no legitimate strategic or tactical reason for counsel's conduct. *McFarland* at 336.

Pinson contends that his trial counsel was ineffective because he engaged in a line of questioning that opened the door to the prosecutor eliciting testimony in rebuttal to show that Pinson was silent when asked whether a fight he had with the victim became physical. RP 22-23, 28.

First, it is not clear that it was necessary to "open the door" prior to introduction of this testimony. As argued above, under the recent United States Supreme Court case of *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), because Pinson had not asserted his right to remain silent, his pre-*Miranda* silence could be used by the prosecution in its case in chief.

Additionally, on the facts of the instant case, Pinson's trial attorney may have had a tactical reason for eliciting the testimony, and Pinson bears the burden of showing that there was no tactical reason for counsel's conduct. *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Pinson was accused of strangulation, and during closing arguments trial counsel emphasized the lesser included offense of assault in the fourth degree. RP 96-107. Pinson's willingness to answer police questions and his non-answer in regard to whether "it got physical" could be interpreted to be inconsistent with an inference that he had strangled his victim as compared to some lesser assault, such as shoving or pushing.

Pinson cites a Fifth Circuit Court of Appeals case, *White v. Thaler*, 610 F.3d 890 (5th Cir. 2010), for its persuasive holding that opening the door to prejudicial evidence regarding the right to silence constitutes

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ineffective assistance of counsel. But *Thayler* involved post-arrest silence as examined under the Texas Constitution, rather than pre-*Miranda* silence as in the instant case. *Id.* at 899-902.

Still more, *Thayler* is highly distinguishable from the facts and issue of the instant case. In *Thayler*, defense counsel opened the door to evidence that the prosecution used to crush the defendant's case. *Id.* at 900. In the instant case, the evidence was relatively inconsequential in light of the evidence as a whole, where there was a 911 tape, excited utterances, and police observations of the victim's injuries, all of which established guilt beyond a reasonable doubt. RP 14-17, 21, 44-48. Pinson's non-answer to whether "it got physical" did little to add to this evidence. On these facts there is little likelihood that the jury's verdict would have been different had they not heard testimony of Pinson's non-answer, but to prevail on his ineffective assistance of counsel claim, it is Pinson's burden on appeal to show that the result would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

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5. The trial court, apparently inadvertently, provided a "reasonable doubt" jury instruction that differed from WPIC 4.01 because it erroneously omitted the sentence that "[t]he defendant has no burden of proving that a reasonable doubt exists." The State contends that this error was harmless beyond a reasonable doubt.

The trial court in the instant case instructed the jury in Instruction No. 3, as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State of Washington is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

RP 85-86; CP 70. The instruction provided to the jury differed from the pattern WPIC instruction because it, apparently inadvertently, omitted the following sentence, which appears at the end of the first paragraph of the pattern instruction, as follows: "The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed) (brackets and italics appear

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in original). Pinson contends that omission of this sentence is error that entitles him to a new trial. Appellant's Opening Brief at 18-22.

A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Castillo,* 150 Wn. App. 466, 469, 208 P.3d 1201 (2009). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett,* 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must also properly inform the jury about the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Bennett,* 161 Wn.2d at 307. It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. *Bennett,* 161 Wn.2d at 307.

But an erroneous jury instruction is "generally subject to a constitutional harmless error analysis." *State v. Lundy,* 162 Wn. App. 865, 871, 256 P.3d 466 (2011). The reviewing court on appeal may hold the error harmless if it is satisfied " 'beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *Lundy,* 162 Wn. App. at 872 (quoting *State v. Bashaw,* 169 Wn .2d 133, 147, 234

P.3d 195 (2010)). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *Lundy,* 162 Wn.App. 872.

Pinson contends that the reasonable doubt jury instruction provided in this case was reversible error under our Supreme Court's *Bennett* decision. *Bennett* "instructed" trial courts "to use the WPIC 4.01 instruction ... until a better instruction is approved." *Bennett*, 61 Wn.2d at 318. The *Bennett* court, however, did not decide whether the failure to give the entire WPIC 4.01 was automatically reversible or instead subject to harmless error analysis.

Division One of the Court of Appeals, in *State v. Castillo,* 150 Wn. App. 466, 469, 208 P.3d 1201 (2009), has concluded that such failure is grounds for automatic reversal. *See* 150 Wn.App. at 472. Division Two of the Court of Appeals, however, reached the opposite conclusion in *State v. Lundy,* 162 Wn. App. 865, 871, 256 P.3d 466 (2011), and held that failure to give WPIC 4.01 verbatim was subject to harmless error analysis. *Lundy,* 162 Wn.App. at 872–73.

Neither party in the instant case highlighted the State's burden of proof, and neither party suggested that Pinson had any burden of proving

or disproving anything at trial. Here, contrary to facts of *Castillo*, the State never tried to shift its burden of proof. *Castillo* at 473. Additionally, *Castillo* involved a potentially confusing jury instruction, but the instruction in the instant case did not contain any such misleading or confusing alterations. *Id.* at 470-71; CP 70.

Finally, the State's instruction to the jury in the instant case contained the following language: "The State of Washington is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." CP 70. This language clearly states that the State bore the burden of proof beyond a reasonable doubt.

In light of the instructions as a whole and the arguments of the attorneys, Pinson has failed to demonstrate that omission of the "defendant has no burden" sentence from the instruction caused him prejudice, especially in light of the fact that the State never attempted to shift the burden of proof to him, the jury was aware that the State bore the burden, and the evidence supporting his conviction was overwhelming. The circumstances show beyond a reasonable doubt that the jury verdict would not have differed had the trial court included the additional "defendant has

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no burden" sentence in its reasonable doubt instruction. Accordingly, the State contends that omission of this sentence was harmless error.

6. Pinson contends that the trial court infringed upon his constitutional right to counsel when at sentencing following his conviction it ordered him to pay the costs of his public defender. Because Pinson failed to preserve this issue with an objection in the trial court, he should not be permitted to raise the issue for the first time on appeal. Finally, because Pinson has the ability to work as a fast-food restaurant manager, the court did not err when it ordered Pinson to pay costs the rate of $25.00 per month.

Following his conviction in the instant case, the trial court entered a judgment and sentence that included boilerplate findings, as follows:

> The Court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 8. The court then ordered Pinson to pay $1,200.00 in fees to reimburse the court for court-appointed attorney's fees. CP 11. Pinson was ordered to make payments at the rate of $25.00 per month beginning 60 days after his release from confinement. CP 12.

Pinson alleges on appeal that he lacks the ability to pay the court's imposition of fees, and he cites *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), to support his contention that the trial court erred in this case because its imposition of attorney fees against him violates his constitutional right to counsel.

No citation to the record was located where Pinson objected to the court's imposition of legal financial obligations. Nothing in the record of the instant case indicates that Pinson suffers from any disability or other impediment to his future ability to pay these costs at the court-ordered rate of $25.00 per month. The record shows that Pinson was employed as manage at a fast food restaurant. RP 64, 123. Thus, Pinson should not be permitted to raise his objection to the imposition of legal financial obligations for the first time on appeal.[3] RAP 2.5(a); *State v. Kuster*, 175

[3] In *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011), this court allowed an appellant to raise this issue for the first time on appeal even though the appellant had not objected in the trial court. However, the trial court in *Bertrand* had evidence showing that the defendant suffered a disability that would limit her ability to pay legal financial obligations, but the court nevertheless made a finding that the defendant had the ability to pay. Thus, the trial court's ruling in *Bertrand* was clearly erroneous because it was not only unsupported by facts in the record, it was actually contradicted. On appeal of *Bertrand*, this court reversed the trial court's finding that appellant had the ability to pay, but this court affirmed the trial court's imposition of costs, holding that the correct time to made the finding of whether the defendant had the ability to pay was at the time the State took action to collect the costs.

Wn. App. 420, 306 P.3d 1022 (July 11, 2013); *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (May 21, 2013), *review granted*, No. 89028-5.

Additionally, the facts and legal analysis of Fuller are dissimilar to the facts and legal circumstances at issue in the instant case. Fuller has been considered by Washington courts, and has been rejected as a basis to overturn a sentencing order to pay attorneys fees. *State v. Barklind*, 87 Wn.2d 814, 815-21, 557 P.2d 314 (1976).

The court may order attorney fees when the following circumstances exist:

> (1) repayment cannot be mandatory; (2) the order may only be imposed on convicted defendants; (3) the defendant must presently or in the future be able to repay; (4) financial resources of the defendant must be examined; (5) no repayment obligations may be imposed if there is no likelihood of the indigence ending; (6) the defendant must be permitted to petition the court for remission of all or part of the fees; and (7) the defendant cannot be held in contempt if failure to pay was unintentional and not done in bad faith.

State v. Wimbs, 74 Wn. App. 511, 516, 874 P.2d 193 (1994), citing *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The court did not err when it ordered Pinson, who has the ability to work as a fast-food restaurant manager, to pay fees at the rate of $25.00 per month.

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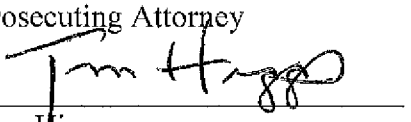
D. CONCLUSION

For the reasons argued above, the State asks the court to sustain Pinson's conviction and sentence.

DATED: October 10, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



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MASON COUNTY PROSECUTOR

October 10, 2013 - 5:26 PM

Transmittal Letter

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